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No. 83-890

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT SPIELVOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court erred in failing to instruct the jury that the government was required to prove that petitioner knew about and agreed to further each of the objects listed in the conspiracy count in his indictment, and that the court erred in not requiring the government to provide additional impeachment material relating to a government witness.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to manufacture and distribute methamphetamine and to distribute phenyl-2-propanone (P2P), in violation of 21 U.S.C. 846, and of manufacturing methamphetamine, in violation of 21 U.S.C. 841 and 18 U.S.C. 2. He was sentenced to a total term of 10 years' imprisonment, with a five-year special parole term, and was fined a total of $10,000. The court of appeals affirmed (Pet. App. 1a-21a).

The evidence at trial showed that from May 1978 through January 1982, co-conspirators Ronald Raiton, who testified for the government, and Joseph DiSantis, Jr., participated in an "international drug ring that grossed millions of dollars" (Pet. App. 5a). The objects of this conspiracy were to manufacture methamphetamine and to distribute P2P (*id.* at 7a). Petitioner's part in the conspiracy involved forming shell companies to purchase the essential ingredients for methamphetamine, particularly P2P, which he sold to Raiton and DiSantis for $500 over the cost of each gallon of P2P (Pet. App. 6a).

Petitioner also "was instrumental in smuggling P2P into the United States from the Bahamas" (Pet. App. 6a). In that connection, petitioner traveled to the Bahamas and rented warehouse space for storing P2P that arrived from France (C.A. App. 868-869). Petitioner used Raiton's money to arrange a line of credit with petitioner's Canadian bank, which was used to pay the French P2P supplier (*id.* at 870-871). Petitioner was also personally involved in the transfer of P2P into the United States (*id.* at 879-880); he arranged for the shipment of the P2P both by ship to Miami and aboard commercial flights to other cities in the United States (*id.* at 879-887).[1] Petitioner was also involved in importing P2P into the United States from Germany through Martinique and Barbados (C.A. App. 891-893).

2. Without citing any authority, petitioner contends (Pet. 12-15) that the district court erred in refusing to instruct the jury that a defendant could be convicted *only* if he agreed to both *objects* of the conspiracy charged in the

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[1]The shipments to Miami were picked up by petitioner, Raiton and other conspirators and taken by automobile to Philadelphia. The shipments aboard the commercial flights were addressed to non-existent cosmetic companies and were picked up by conspirators at the various airports (C.A. App. 879-887).

indictment, *i.e.*, to manufacture methamphetamine and to distribute P2P. Petitioner's contention is without merit.

As the court of appeals observed (Pet. App. 8a n.1), petitioner's requested instruction was not a correct statement of the law. Proof that a defendant agreed to *any* of the objects of a single conspiracy is sufficient to support a conviction. See *United States* v. *Murray*, 618 F.2d 892, 898 (2d Cir. 1980); *United States* v. *Boscia*, 573 F.2d 827, 834 (3d Cir.), cert. denied, 436 U.S. 911 (1978). Cf. *Anderson* v. *United States*, 417 U.S. 211, 226 (1974). Moreover, in this case there was ample evidence to prove that petitioner knew about and participated in both objectives of the conspiracy. Finally, as the court of appeals noted (Pet. App. 7a), the district court's instructions to the jury on conspiracy required the jury to find "the conspiracy charged in the indictment," and did not even incorporate the "one objective is enough" theory to which petitioner objects.[2]

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[2]The instruction in issue, which petitioner concedes (Pet. 15) was "technically correct," was as follows (Pet. 14):

> The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement, or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation.

Petitioner asserts (Pet. 14-19) that the conspiracy charge may have "confused" the jury so that it convicted him even though it found that he had agreed to only one of the objectives of the conspiracy, and therefore the court permitted a "de facto" amendment of the indictment. The court of appeals correctly concluded (Pet. App. 7a), however, that the instructions were proper. There is nothing "confusing" about them. They do not suggest that petitioner could be convicted on the "one is enough" theory, nor would they have been erroneous if they had.

3. Nor is there any merit to petitioner's contention (Pet. 20-23) that he was prejudicially denied material that could have been used to impeach the testimony of co-conspirator Raiton. The government provided the defense in this case with "voluminous" discovery material, much of which concerned Raiton's background (C.A. App. 557). Contrary to petitioner's claim (Pet. 21), the district court granted his motions for documents relating to Raiton's dealings with the government (C.A. App. 600), and he was also provided with all portions of Raiton's tax records that contained impeaching material.

Based largely on the material supplied by the government, petitioner and his co-defendants cross-examined Raiton vigorously and at length, and Raiton never denied that he had engaged in fraudulent activities, that he had suborned perjury, that he had bribed judges, that he had millions of dollars in Swiss bank accounts, and that he had had business dealings with FBI agents and also with a former Assistant United States Attorney who had nothing to do with this case. Petitioner had a full and fair opportunity to impeach Raiton; no material, non-cumulative information regarding Raiton's credibility was concealed from petitioner by the government.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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